

ARNOLD MUSENGI JHAMB  
and  
DICKSON MUSENGI JHAMB  
and  
JUDITH MUSENGI JHAMB  
versus  
CITY OF GWERU

HIGH COURT OF ZIMBABWE  
MAVANGIRA J  
HARARE, 26 and 27 November 2013 and 17 September 2014

### **Urgent Chamber Application**

*T. Bhatasara*, for the appellants  
*P. Dube*, for the respondent

MAVANGIRA J: The urgent chamber application involving the above cited parties was heard on 26 November 2013. I granted a Provisional Order on 27 November 2013. I did not furnish a written judgment then. It was anticipated that the respondent would, if it found it fit to do so after being served with the Provisional Order, in due course file opposing papers so that the matter would eventually be fully ventilated on the “return day”. On 11 April 2014, the Registrar wrote requesting reasons for judgment for purposes of an appeal filed by the respondent against the Provisional Order. The reasons follow hereunder.

It was the appellants’ case that in or about 2007 they purchased an immovable property from the respondent but the agreement of sale was only signed by the parties in 2011. The first applicant who deposed to the founding affidavit avers that when they signed the agreement of sale they initialled all pages and returned all copies to the respondent for the respondent’s signature. However, when they received their copy of the agreement back he noticed that the first page had been removed and replaced with one that did not have the parties’ initials. He also noticed that the original agreement that they signed did not have the words “lying on the foot print” that now appeared. It is contended that this is a clandestinely introduced variation on which the respondent is now basing its allegedly unlawful actions. It is further contended that without any right granted to it in terms of the agreement of sale and

without any recourse to due process the respondent proceeded to erect a commuter omnibus rank on a portion of the property despite the appellants' protestations. The appellants' protestations were founded on the contention that the respondent's actions violated the appellants' rights, interfering with their use and enjoyment of their property. It is also contended that the respondent had disturbed them from their peaceful possession of the property without due process. The appellants also claim that the respondent's action of erecting a commuter omnibus rank on the premises amounted to spoliation.

The respondent on the other hand contends that what was sold was the building only and not the land behind the building, this apparently being the site of the commuter omnibus rank that has triggered this application. It also contends that the said portion of land was never in the peaceful possession of the applicants either.

A perusal of the agreement of sale, Annexure A to the founding affidavit shows that on 3 November 2011 the Mayor and Town Clerk represented the respondent as seller in the agreement with the first and third applicants being the purchasers of "a certain developed piece of land known as **Stand Number 798 G.T.L. Lying on the foot print** situate in the district of Gweru." Clause 4.3.2 of the agreement provides:

"That the seller by its officers, servants or contractors shall, at all times, have the right and power free of charge to erect and /or lay pipe lines, electric lines, sewers, drains, poles and standards upon, over or under the said piece of land, with the further right to enter the said piece of land at all times for the purpose of repairing and maintaining, replacing, altering or inspecting such pipe lines, electric lines, sewers, drains, poles and standards or any other purpose or function that the seller is empowered to perform as a municipality."

The appellants contend that the respondent's actions *casu* are not part of the rights that the agreement of sale gave or gives to the respondent in respect of the immovable property that they purchased from the respondent which property includes the said piece of land.

The requirements for the granting of a temporary interdict have been set out as being firstly, a *prima facie* right which may be open to some doubt. The second is a well grounded apprehension of irreparable injury or harm. The third is the absence of an ordinary or alternative effective remedy. In exercising its discretion the court also looks at the balance of convenience. See *Econet (Pvt) Ltd v Minister of Information, Posts & Telecommunications* 1997 (1) ZLR 342 (H); *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S) at 89E – 90A

In *Econet (Pvt) Ltd v Minister of Information, Posts & Telecommunications* 1997 (1) ZLR 342 (H) the following was stated at 344G -345B:

“... for a temporary or interim interdict the requisites are: (1) that the right which is sought to be protected is clear; or (2)(a) if it is not clear, it is *prima facie* established, though open to some doubt and (b) there is a well grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right; (3) that the balance of convenience (“balance of justice”) ... favours the granting of interim relief; and (4) the absence of any other satisfactory remedy.”

In *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S) at 89E – 90A the following was stated:

“... in *Eriksen Motors (Welkom) Ltd v Proten Motors, Warrenton & Anor* 1973 (3) SA 685 (A) HOLMES JA, dealing with the issue of temporary interdicts, said the following at 691C-G:

“The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the court.”

In *casu* it is not in dispute that the applicants, at least the first and third applicants, purchased immovable property from the respondent though there may be doubt as to the exact extent of it in view of the respondent’s stance regarding the portion or location where the commuter omnibus rank has been erected. The applicants’ claim to the piece of land appears to have a basis in the agreement of sale even though the respondent’s stance might be viewed as rendering right of ownership by the applicants open to doubt with respect to that portion. The first requirement would thus seem to be present. The applicants’ apprehension of irreparable harm arises from and is based on the construction of the rank on property that they claim as theirs as indicated in the setting out of the first requirement. The interference with their use and enjoyment of the property is presented by the erection of the rank and the resultant use of it without their consent to it as owners of the property and also thereby preventing the applicants from enjoying its use. There was no submission or suggestion as to any alternative remedy that could avail the applicants. Ventilation of the parties’ respective rights or claims would be heard by the court on the return day. The terms of the interim relief are not the same as those of the final relief granted. The said interim relief was granted on the basis of the establishment of a *prima facie* right of the applicants as owners, to the enjoyment of their property. If on the return date the court would find otherwise after full ventilation of the matter by the parties and the basis for the interim relief granted, being the *prima facie*

right as owners of the property is not established, the applicant would then be disabled from continuing to enjoy the relief afforded it herein on the said basis. In effect it was an interim interdict granted pending the determination of the dispute between the respective sides as to ownership of the portion of the property on which developments have been made giving rise to these proceedings. It is not a final interdict. The interim relief was thus granted in these circumstances.

What the applicants sought was a Provisional Order against the respondent in the following terms:

**“TERMS OF THE FINAL ORDER SOUGHT**

- a) **The designation and construction of an omnibus rank, or any other intended use of the property of applicants being Lot 2 of Stand 798 Gwelo Township Lands commonly referred as Flea Market Building by the Respondent which is not specified in the agreement of sale between the parties be and is hereby declared unlawful.**
- b) **The Respondent is directed to demolish the ranking structure it put up, clean up the premises to its state before the spoliation.**
- c) **Respondent be and is hereby ordered to pay the costs of the application on attorney-client scale.**

**TERMS OF THE INTERIM RELIEF GRANTED**

Pending the return date in this matter, the following interim relief be and is hereby granted:-

- a) The respondent, all employees, associates, agents, assignees and third parties including commuter omnibus operators, drivers, conductors and commuters are hereby interdicted from entering, interfering or otherwise disturbing the peace of applicants and all those at the above mentioned property with applicants' consent.
- b) The respondent is hereby ordered upon service of this order on it to remove all people and property at the premises of applicants, who are present at the instance, invitation and through the respondent. The Deputy Sheriff, Gweru is directed to assist in enforcing this order if necessary.”

After hearing the parties and for the reasons discussed above I granted a Provisional Order with the interim relief as amended in favour of the applicant in the following terms:

**“TERMS OF THE INTERIM RELIEF GRANTED**

That pending the return date in this matter, the following interim relief be and is hereby granted:-

- a) The respondent, all employees, associates, agents, assignees and 3<sup>rd</sup> parties including commuter omnibus operators, drivers, conductors and commuters are hereby interdicted from entering, interfering or otherwise disturbing the peace of applicants and all those at the above mentioned property with applicants' consent.
- b) The respondent is hereby ordered upon service of this order on it to remove all people and property at the premises of applicants, who are present at the instance, invitation and through the respondent."

*Mupanga Bhatasara Attorneys*, applicants' legal practitioners  
*Gundu & Dube*, respondent's legal practitioners